SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

No. [illegible] 21

ALLEN COBERT,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

EPHRAIM LONDON,
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New York, N. Y. 10017.

On the Petition,
EPHRAIM LONDON,
HELEN L. BUTTENWIESER,
MARTIN GARBUS.

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IN THE

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OCTOBER TERM, 1965.

[redacted]

No.

ALLEN COBERT,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

The Petitioner, Allen Cobert, respectfully requests a Writ of Certiorari to the Court of Appeals of the State of New York to review a judgment of that Court which affirmed, with three of the seven Judges of the Court dissenting, Petitioner's conviction of selling and possessing with intent to sell three obscene motion picture films.

Opinions Below.

No opinion was given by the Criminal Court of the City of New York, County of New York, when the judgment convicting Petitioner was entered December 13, 1963.

The opinions of the Appellate Term of the Supreme Court, First Department, modifying the judgment of conviction by reducing Petitioner's sentence (one Justice dissenting) were filed October 29, 1964. The opinions are reproduced at pages 63-69 of the Record on Appeal.

The Court of Appeals affirmed the judgment of conviction without opinion. A copy of the judgment of the Court of Appeals is attached as Appendix A. The memorandum decision of the Court and of the three Judges dissenting from the judgment of affirmance, is reproduced as Appendix B to this Petition. The decision of the Court of Appeals is reported at *People* v. *Cobert*, 15 N. Y. 2d 1020.

A motion to the New York Court of Appeals for leave to reargue was denied, without opinion on June 10, 1965. A copy of the order of the Court denying the motion is attached as Appendix C to this Petition.

Jurisdiction.

The judgment of the Court of Appeals of the State of New York sought to be reviewed was entered April 15, 1965. A motion for leave to reargue was denied June 10, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

The Questions Presented for Review.

1. Whether the conviction of Petitioner for selling and possessing with intent to sell, certain films that were held obscene, but are not "hard-core pornography", was a denial of due process and an infringement of the right of communication for there was no proof at the trial of community standards and no proof that the films exceeded

the limits of candor permitted in the State or in the nation, and no proof of the effect of the films, and no proof of the obscene nature of the films.

2. Whether the rights guaranteed by the First and Fourteenth Amendments were violated by the Petitioner's conviction of selling and possessing obscene films, without proof that he knew the character of the films and without proof that he knew or had reason to believe they were obscene.

3. Whether the New York Courts' failure to apply any ascertainable criteria in determining that the films sold and held by Petitioner are obscene, and whether the conviction of Petitioner for selling and possessing films indistinguishable from other films held not obscene by the same Courts, constituted denial of due process and of equal protection of the laws, and of the right of communication.

4. Whether the Trial Court, in convicting Petitioner, and the New York appellate courts in affirming his conviction, of selling and of possessing obscene films, judged the films obscene in accordance with standards in conflict with those prescribed by this Court, and punished Petitioner for dealing with films within the protection of the First and Fourteenth Amendments of the Constitution.

5. Whether Section 1141 of the New York Penal Law as interpreted and applied in this case infringes the right of communication protected by the First and Fourteenth Amendments and is void for vagueness under the due process clause of the Fourteenth Amendment in making it a penal offense to sell, or to possess with intent to sell, obscene motion picture films.

Constitutional Provisions and Statutes Involved.

The Constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution. The New York Statute referred to herein is New York Penal Law §1141. The following are the pertinent portions of New York Penal Law §1141:

> "§1141. Obscene prints and articles.
>
> "1. A person who sells, lends, gives away, distributes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, . . . any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting . . . motion picture film . . . which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character; • • •
>
> "Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or be fined not less than one hundred fifty dollars nor more than two thousand dollars or both fine and imprisonment for the first offense; • • •
>
> "4. The possession by any person of six or more identical or similar articles coming within the provisions of subdivision one of this section is presumptive evidence of a violation of this section."

Statement of the Case

This appeal is from the affirmance by the New York Court of Appeals (with 3 of the 7 Judges dissenting) of a judgment convicting Petitioner, Allen Cobert, of selling an allegedly obscene motion picture film and of possessing, with intent to sell, two other motion picture films, that were said to be obscene.

There were six counts in the Information on which Petitioner was tried. The first count charged Petitioner with the sale of "a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting motion picture film entitled June Palmer #2" (R. 3).* The other five counts charge Petitioner with possessing, with intent to sell, other films described in the same terms (R. 3-6).

Petitioner was found guilty December 13, 1963, by three judges of the Criminal Court of the City of New York, New York County, on Counts 1, 2 and 6 of the Information and he was acquitted on Counts 3, 4 and 5 (R. 57).

The only witness who testified at Petitioner's trial was the arresting officer, Patrolman Szachacz. Szachacz said that on July 19, 1964, he came to Petitioner's studio and described himself as a representative of the Art League Association (R. 8-9). The patrolman purchased a number of slides of nude figures that he said were to be used instead of live models by his drawing classes (R. 33, 34). It is not claimed that any of the slides purchased by the patrolman were obscene.

Szachacz testified that he returned to the Petitioner's studio four days later and had the following conversation with the Petitioner Cobert on that day (R. 12):

> "Q. What did you tell him? A. I told him we were going to have a party over the weekend and in this party I would like to show the people something different so as to draw them, and I was seeking some bachelor-type films that could be shown at this party. Mr. Cobert said that he doesn't believe he had what I think he has available but, however, he does have other art films that I may be interested in.

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* Numerical references following the letter R are to the Record on Appeal.

> "Q. You mean in connection with this party? A. In connection with the party. I told Mr. Cobert—well, I said, 'I'll have to see because I was looking for something of a particular nature, and I'll get in touch with you again.' "

(The term "bachelor-type" films was intended as a synonym for pornographic pictures (R. 12, 29).)

The patrolman stated further that on July 25, 1964, he returned to Petitioner's studio and purchased one of the films (JUNE PALMER #2) that Petitioner Cobert had described as being an art film but not a "bachelor-type" or pornographic film. Szachacz was charged and paid $5.00 and the sales tax for the film (R. 13). Later that day Szachacz returned to Petitioner's place of business, arrested him, and seized five other boxes containing film (R. 16).

The film purchased and the five taken from Petitioner are the subjects of the six counts of the Information (R. 3-6, 17-23). Each of the six films,* the one purchased and the five seized, were contained in small white boxes. The one sold to the patrolman had a photograph of a half-nude woman attached. The others bore only the titles of the films. Each of the films is in color, of 8 mm gauge and 50 feet long. Each shows a woman partially clad or nude, appearing alone in various poses, standing, moving about and lounging on a bed or sofa. The subjects' pubic hair and genitalia cannot be seen. Except for the difference in the faces, and the contours of the bodies of the women who appear in them, the several films involved in this case are virtually fungible. As shown on the appeal, the $5.00 price charged for the film is slightly below the

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* People's Exhibits 1-6, inclusive.

standard price for developed color film of the same length and gauge.

No evidence was offered at the trial with respect to the nature of the films tolerated in the community, with respect to the standards of the State or Nation, or with respect to the effect of the films. Such evidence would, we believe, have shown that the films are innocuous and quite similar to, and not more offensive than, most of the nudist films licensed for exhibition and shown in New York and in other states.

All of the pictures named in the six Counts of the Information are of the same kind as, and are indistinguishable from each other and in any relevant respect from, the film found *not* obscene by the New York Court of Appeals in *People* v. *Revo*, 15 N. Y. 2d 743.

Before examining the six films listed in the six Counts of the Information against Petitioner, the Court of Appeals had them spliced together. As a result of error the films were not spliced in the order in which they were received in evidence. The order in which the films were spliced and shown to the Court of Appeals was: Exhibits 1, 5, 3, 4, 2, 6 (R. 77-78). (The order in which the films were marked as exhibits corresponded with the numbers of the Counts of the Information.) A motion for reargument was made to the New York Court of Appeals on the ground that the Court had, in affirming Petitioner's conviction on Count 2 (involving the film entitled M. JORDAN) actually viewed and considered the film entitled "LORRAINE BURNETT" (involved in Count 5 of the Information) which the Trial Court had not found obscene.

The New York Court of Appeals, in denying the motion for reargument, indicated that it had in fact affirmed the Petitioner's conviction on films involved in Counts 1, 2 and 3 (R. 85). Petitioner, it will be remembered, had

been acquitted by the Trial Court on Count 3 (involving the film "B. LOGAN, SHOWER") and had been convicted on Count 6 (involving the film "JAYNE TRACY"). (Since the circumstances of the case with respect to the films that were the subjects of Counts 2, 3, 4, 5 and 6 of the Information were identical, the acquittal of Petitioner by the Trial Court on Count 3 was in effect a determination that that film was not obscene. His conviction on Count 6 required a finding that the film, that was the subject of that Count, was obscene.)

The Manner in Which the Federal Questions Sought to be Reviewed were Raised

(1) The question of whether there was a denial of due process because the State did not offer any evidence of the standards of the community or with respect to the effect of the films involved in this case, were raised at the trial by motion to dismiss the Information (R. 54-55) and in the briefs and arguments to the Courts below.

(2) The question with respect to the State's failure to prove Petitioner's knowledge of the obscenity of the films involved in this case or Petitioner's wrongful intent in having or selling the films, was raised at the trial by motion to dismiss the Information (R. 54-55) and in the briefs and arguments to the Courts below.

(3) The question of whether the conviction of one who, without guilty knowledge or intent, has or sells obscene matter is an abridgment of freedom of communication and a deprivation of liberty without due process of law was raised at the trial by motion to dismiss (R. 54-55) and in the briefs and arguments to the Courts below.

(4) The question of whether the Trial and Appellate Courts below judged the films in this case to be obscene in

accordance with standards in conflict with those prescribed by this Court was raised in the Trial Court by motion to dismiss the Information (R. 54-55) and in the briefs to the Trial and Appellate Courts. The question was also passed upon by the New York Court of Appeals. The reference to *People* v. *Revo,* 15 N. Y. 2d 743, in the dissenting opinion in the Court of Appeals in this case was to the holding that the film involved in that case was "not obscene within the holdings of the United States Supreme Court . . ." (*People* v. *Revo,* 15 N. Y. 2d 743).

(5) The question of the unconstitutionality of New York Penal Law 1141 as applied in this case, and the question relating to the denial of due process by the Courts' application of purely personal subjective standards in determining that three of the films held by Petitioner are obscene, were raised in the briefs and argument to the Appellate Courts below, and on the motion for reargument to the New York Court of Appeals.

The Trial Court, and the Appellate Courts held in effect, with respect to the questions raised, that there had not been a denial of Petitioner's Constitutional rights and that Section 1141 of the New York Penal Law as applied in this case is Constitutional.

Reasons for Allowance of the Writ.

Preliminary Statement

The Constitutional questions referred to in this Petition are substantial and the questions presented for review, other than the question numbered (4), have not been adjudicated, and should, we believe, be resolved by this Court. Each of the questions presented relates to the fundamental right of expression and is of sufficient public importance and interest to merit plenary consideration.

Some of the questions raised that this Court has not yet passed on are: whether the State is required, in a criminal prosecution for selling or possessing allegedly obscene matter which cannot properly be described as hard-core-pornography, to prove that the material offends the community standards, is beyond the limits of candor tolerated in the community, and that the material would arouse the prurient interest of adults of the community.

Other questions presented were posed by this Court but left undetermined in *Smith* v. *California*, 361 U. S. 147. Those questions relate to the nature of the mental element "requisite to a constitutionally permissible prosecution" of a dealer for selling and possessing material said to be obscene, and whether the State is required in such prosecution to prove the Defendant's knowledge or reason to believe the material obscene.

The Questions Presented are Substantial

I. Section 1141 of the New York Penal Law as interpreted and applied in this case violates the Federal Constitutional guarantees of freedom of communication and due process because it authorizes the punishment of a seller of allegedly obscene material, that is not hard-core pornography, without requiring proof that the material offends the standards of the people of the state or the nation and that the material is obscene according to any of the standards formulated by this court.

> "The question is whether 'there is sufficient evidence in the record upon which a finding of obscenity could be made. If there is no evidence in the record upon which such a finding could be made, obviously the material involved cannot be held obscene.' Cf. Thompson *v.* City of Louisville, 362 U. S. 199, 4 L. Ed. 2d 654."
>
> *Jacobellis* v. *Ohio*, 378 U. S. 184, 202, dissenting opinion of The Chief Justice and Mr. Justice Clark.

In a criminal prosecution for selling an obscene article the prosecution has the burden of proving affirmatively every essential element of the offense. (See *Larkin* v. *G. P. Putnam's Sons;* 14 N. Y. 2d 399, at p. 403; *United States* v. *Klaw* (decided July 15, 1965), ... F. 2d ..... (2d Cir.) Docket pages 2758, 2763-2772. "Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact finder of his guilt" and "where the transcendent value of speech is involved" due process requires "that the State bear the burden of persuasion to show the (accused)

engaged in criminal speech." *Speiser* v. *Randall*, 357 U. S. 513, 526. (Matter in parentheses ours.) See also *Thompson* v. *Louisville*, 362 U. S. 199, 206, and cases cited in *New York Times Co., et al.* v. *Sullivan*, 376 U. S. 254, 271, 277-280, 283-288.

In the instant case the Courts below were left to speculate about each of the elements of the charges against Petitioner. The only witness who testified in this case was the patrolman who purchased one of the films from Petitioner and who took the other films involved in this case from Petitioner's studio.

A work may not be judged obscene unless its "dominant theme of the material, taken as a whole, appeals to prurient interest" *Roth* v. *United States*, 354 U. S. 476, 489. Unless the Court is to apply its own subjective standards in determining whether the material in question is obscene, proof must be furnished to supply "the fact-finders with knowledge of what appeals to prurient interest so they have some basis for their conclusion", *U. S.* v. *Klaw* (decided July 15, 1965) ..... F. 2d ..... (2d Cir.) Docket page 2758 at 2763. "Obviously the issue of what stirs the lust . . . requires evidence of special competence" (*Klaw* v. *Schaffer*, 151 F. Supp. 534, 539, Note 6). See also *Parmelee* v. *United States*, 113 F. 2d 729, 731; *Yudkin* v. *State*, 229 Md. 2d 223, 182 A. 2d 788.

The threshold question in determining whether material may be condemned as obscene, or one may be punished for selling it, is whether it is considerably more explicit and bolder in treatment than other material of the same nature that is generally tolerated. If communications are not "so offensive on their face as to affront current community standards of decency," to use Mr. Justice Harlan's phrase (*Manual Enterprises* v. *Day*, 370 U. S. 478, 482), to punish one for distributing it violates the First Amendment

guaranty of freedom of expression. "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." *Smith* v. *California,* 361 U. S. 147, 171 (concurring opinion, Mr. Justice Harlan).

In *Jacobellis* v. *Ohio,* 378 U. S. 184, Mr. Justice Brennan wrote (p. 191):

> "It should also be recognized that the Roth standard requires in the *first instance* a finding that the material 'goes substantially beyond customary limits of candor in description or representation of such matters.'" (Emphasis ours.)

See also *Manual Enterprises* v. *Day,* 370 U. S. 478, 486. It can not be assumed that the Trial Judges in this case, or the Judges of the Courts to which Petitioner appealed from his conviction, knew "with anything that approximates reliability, the 'average' American public opinion on the subject . . ." (*Roth* v. *Goldman,* 172 F.2d 788, 796). As Mr. Justice Frankfurter wrote in his concurring opinion in *Smith* v. *California,* 361 U. S. 147, 165:

> "There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, Roth *v.* United States, 354 U. S. 476, 489, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are."

The absence of any evidence on the question of whether the films in this case were obscene according to constitutional standards made it necessary for the Judges of the

Courts below to judge the films in accordance with purely personal, subjective standards. It will be clear, we believe, from an examination of the three moving pictures that the Court found offensive, and of the three that were found not-offensive, that the films were not judged according to any objective criteria, for there is no discernible difference between them. As noted before, the New York Court of Appeals, in sustaining Petitioner's conviction, based its determination, in part, on a film that the Trial Court found was not obscene (Exhibit 3), and the Court of Appeals did not consider as obscene one of the films on which the Petitioner's conviction rested (Exhibit 6). This Court will be asked to review the six short films involved in this case, and the almost identical film held not obscene in *People* v. *Revo*, 15 N. Y. 2d 743. Unless the Court is given the information, we doubt that it will be able to determine which films were found to have offended, and which films were found not to have offended, the New York Penal statute.

II. New York Penal Law Section 1141 violates the requirements of due process and the constitutional guarantees of freedom of communication in sanctioning a conviction for the sale and possession of obscene films without proof that the accused knew or had reason to believe that the films are obscene.

In *Smith* v. *California*, 361 U. S. 147, the Court struck down an ordinance making the offering of obscene books a penal offense even though the bookseller may not have been aware of the content of the material offered. The ordinance involved in *Smith* completely eliminated the requirement of *scienter* and imposed a strict criminal liability on any store owner possessed of an obscene book whether or

not he had seen the book, or knew what it contained. Such ordinance, the Court held, tends to restrict the sale and distribution of constitutionally protected expression by making it necessary for booksellers to read all books received for sale, in order to avoid criminal liability, 361 U. S. at p. 153.

It was unnecessary for the Court in *Smith* v. *California*, to determine whether a statute punishing the holding or offering of obscene material for sale, meets constitutional requirements if it dispenses with the requirement of culpable intent, that is with the requirement that the accused know or have reason to believe that the material is obscene. Mr. Justice Brennan wrote for the Court: "We need not and definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; . . ." (361 U. S. at p. 154).

The Court's reasons for condemning the ordinance involved in *Smith* v. *California* apply with equal force to the statute here challenged. In the *Smith* case the Court said, 361 U. S. at p. 152:

> "The ordinance here in question, to be sure, only imposes criminal sanctions on a bookseller if in fact there is to be found in his shop an obscene book. But our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold."

A statute prohibiting possession or sale of obscene matter that fails to require proof of knowledge that it is obscene, also imposes an excessive burden on those who

deal in films or other media of communication by compelling them to do so at their peril, and the statute, in that way, inhibits the flow of communication. This Court has, for that reason consistently condemned laws punishing expression where "drawn without regard to the presence or absence of guilty knowledge". *Sweezy* v. *New Hampshire,* 354 U. S. 234, 248; *Winters* v. *New York,* 333 U. S. 507, 519; *Wieman* v. *Updegraff,* 344 U. S. 183, 191; *Speiser* v. *Randall,* 357 U. S. 513; *Staub* v. *Baxley,* 355 U. S. 313, 325.

The State Courts have generally held, in cases decided after *Smith* v. *California,* that a defendant accused of dealing in pornography cannot be found guilty unless he had knowledge of the obscene nature of the material, and that the State must affirmatively prove such knowledge at the trial. *Cohen* v. *Florida,* 125 So. 2d 560, 563; *State* v. *Sul,* 146 Conn. 78, 84-88, 147 A. 2d 686, 690-691; *State* v. *Hudson County News,* 35 N. J. 284, 292-294, 173 A. 2d 20, 25; *State* v. *Oman,* 261 Minn. 10, 17-18, 110 N. W. 2d 514, 520; *State* v. *Locks,* 97 Ariz. 148, 397 P. 2d 949, 951; *Demetropolos* v. *Commonwealth,* 342 Mass. 658, 661, 175 N. E. 2d 259, 262. See also *Manual Enterprises* v. *Day,* 370 U. S. 478, 492-495.

In the instant case there was no evidence that Petitioner knew the nature of the films in his possession or that he had reason to believe that the films were obscene. The evidence offered at the trial with respect to Petitioner's state of mind leads to a different conclusion. It will be recalled that the States's only witness testified that when he asked Petitioner for "bachelor-type" (pornographic) films, the Petitioner stated that he did not have films of that kind but did have art films (similar to the slides previously sold to the witness, and which were not found offensive) (R. 12, 29). The fact that the film sold by Petitioner to the State's witness was offered at a lower than standard price would also indicate that Petitioner did not consider it contraband.

There was nothing on the package in which the films were sold that would reveal their allegedly obscene nature or require further investigation on Petitioner's part to determine whether the films were in any way improper. All the films involved in this case were in plain white boxes, each bearing the printed title of the film enclosed. One box, containing the film sold to Patrolman Szachacz, had a still photograph attached to it. The photograph was of a half-naked girl. The photograph was not in itself obscene or an indication that the film in the box was obscene and, as the Court may observe, the photograph is similar to pictures featured in national "girlie" magazines sold openly at newsstands.

The proof in this case failed to establish any knowledge on the part of Petitioner with respect to the alleged obscene character of the films and failed to establish any wrongful intent on his part. New York Penal Law Section 1141 as interpreted and applied in this case is therefore in conflict with the Constitution and Petitioner's conviction of violating the statute should be set aside.

For the reasons outlined, it is submitted that the questions presented are substantial, and that this Petition for a Writ of Certiorari should be granted and that a plenary consideration of the issues is warranted.

Respectfully submitted,

EPHRAIM LONDON,
Attorney for Petitioner.

On the Petition,
EPHRAIM LONDON,
HELEN L. BUTTENWIESER,
MARTIN GARBUS.

APPENDIX A

Judgment of the Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

THE PEOPLE & C., Respondent, *against* ALLEN COBERT, Appellant.	Order.

BE IT REMEMBERED, that on the 1st day of March, in the year of our Lord one thousand nine hundred and sixty-five, Allen Cobert, the appellant—in this cause, came here unto the Court of Appeals, by Brennan, London & Buttenwieser, Jac M. Wolff, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Term of the Supreme Court, First Judicial Department. And the People & C., the respondent—in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney,

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Ephraim London, of counsel for the Appellant—, and by Mr. Robert B. Sperling, of counsel for the respondent—and after due deliberation had thereon, did order and adjudge that the Judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

Judgment of the Court of Appeals.

Therefore, it is considered that the said judgment be affirmed as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals Clerk's Office
Albany, April 15, 1965.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

APPENDIX B

Memorandum Opinion of the Court of Appeals.

15 N. Y. 2d 1020

THE PEOPLE, etc.,

Respondent,

v.

ALLEN COBERT,

Appellant.

COURT OF APPEALS OF NEW YORK.

April 15, 1965.

Appeal from Supreme Court, Appellate Term, First Department.

Defendant was convicted under the first, second and sixth counts of information charging that he sold moving picture films in violation of Section 1141 of the Penal Law, Consol. Laws, c. 40, dealing with sale of obscene prints and articles.

The Criminal Court of the City of New York, New York County, entered judgment, and the defendant appealed.

The Appellate Term entered an order modifying the judgment of the Criminal Court to reduce the sentences. The defendant appealed to the Court of Appeals.

Judgment affirmed.

All concur except Dye, Fuld and Bergan, JJ., who dissent and vote to reverse and to dismiss the information. (See People *v.* Revo, 15 N. Y. 2d 743, 257 N. Y. S. 2d 173, 205 N. E. 2d 310.)

APPENDIX C

Order of the New York Court of Appeals Denying Leave to Reargue.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of June A. D. 1965.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 581

THE PEOPLE &c.,

Respondent,

vs.

ALLEN COBERT,

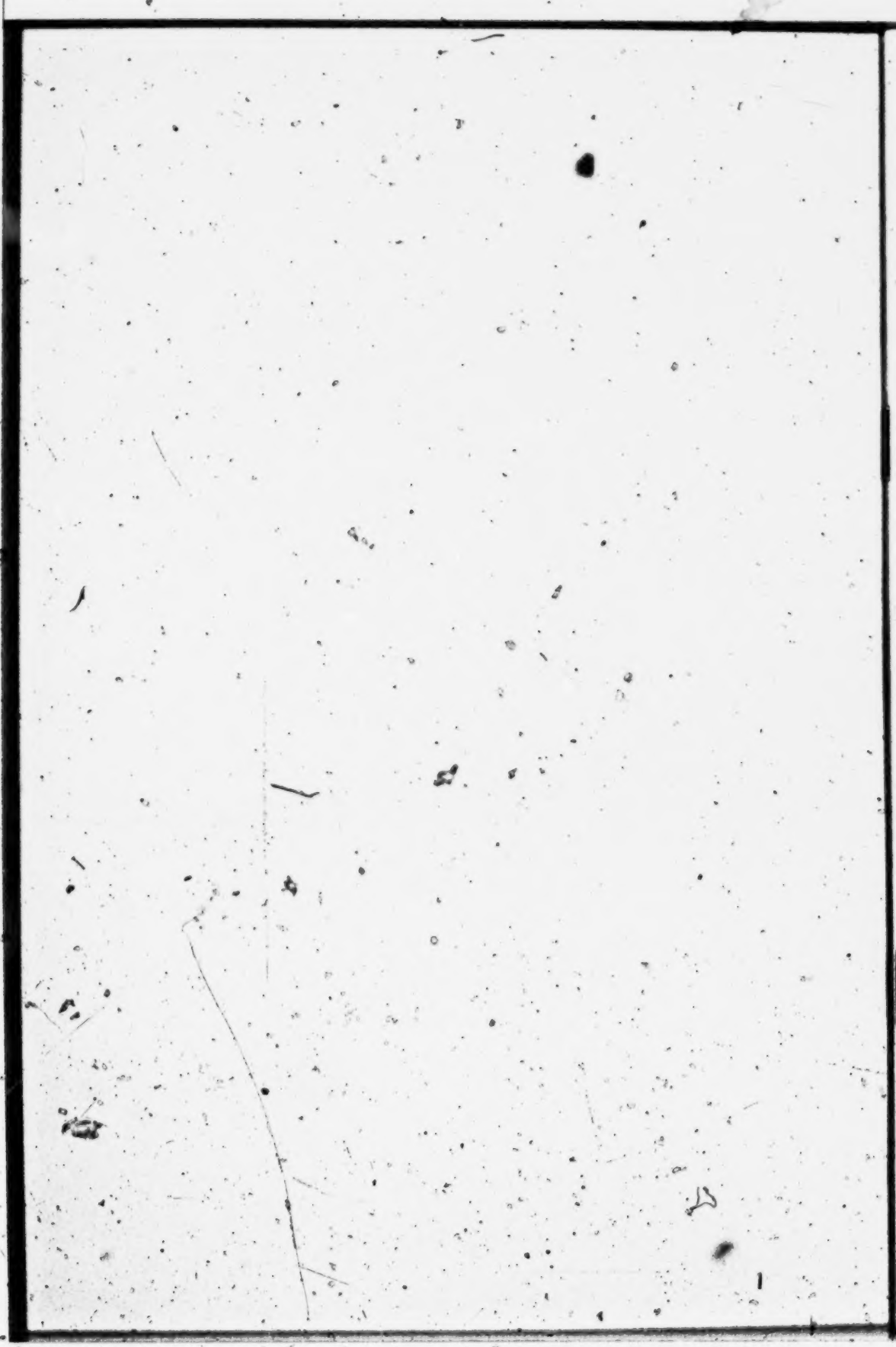
Appellant.

A motion for reargument of the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied. Although the films were not spliced in numerical order, this Court, after viewing all the films or strips, affirmed the convictions on the films identified as Exhibits 1, 2 and 3.

A copy

GEARON KIMBALL
Deputy Clerk



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IN THE

Supreme Court of the United States

October Term, 1965

No. 21

ALLEN COBERT,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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Section 1141	2

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On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

---

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to the Court of Appeals of the State of New York, to review a decision of that court, entered April 15, 1965, affirming by a divided court the judgment of the Criminal Court of the City of New York, New York County, rendered on January 30, 1964, convicting the petitioner, after trial, of violating Section 1141 of the New York Penal Law (SELLING

AND OFFERING TO SELL OBSCENE PRINTS AND ARTICLES). On October 29, 1964, the Appellate Term of the Supreme Court, First Department, had modified the judgment of conviction by reducing the petitioner's sentence from one year plus a fine of $500 or 90 days given on the first count of the information to 60 days in the penitentiary plus a $500 fine or, in lieu thereof, 60 days' imprisonment, and by reducing each of the sentences given on the remaining two counts under which he was convicted—the second and sixth counts of the information—from one year to 60 days in jail; all sentences to run concurrently.

Questions Presented

1. Whether the films designated People's Exhibits 1, 2 and 6 are obscene.

2. Whether the People have the burden of establishing, beyond merely offering the articles which are the subject of the prosecution into evidence, what is offensive to contemporary community standards; a constitutional test to be applied in the determination of the issue of obscenity.

3. Whether there was sufficient proof on the issue of *scienter*.

The Statute Involved

Penal Law Section 1141 reads in pertinent part:

"1. A person who sells, lends, gives away, distributes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with in-

tent to sell, lend, distribute, give away, show or transmute, * * * any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting * * * motion picture film * * * which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character; * * *

"Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or be fined not less than one hundred fifty dollars nor more than two thousand dollars or both fine and imprisonment for the first offense * * *.

"4. The possession by any person of six or more identical or similar articles coming within the provisions of subdivision one of this section is presumptive evidence of a violation of this section."

Statement of Facts

The petitioner was tried under a six-count information, the first count charging him with the sale of an obscene motion picture film, and the remaining five counts charging him with possessing, with the intent to sell, five other obscene motion picture films.

The only witness who testified at the petitioner's trial was the arresting officer, Patrolman Walter Szachacz. Szachacz testified that on July 17, 1963, at the premises 115 West 30th Street, Room 402, occupied by Allen Enterprises, Inc., he introduced himself to the petitioner as being from the Art League Association and stated that he wanted certain nude pictures enlarged so that his students could

project the prints and use them as models. After some discussion, the petitioner suggested that three-dimensional slides of nude women would be more appropriate for the drawing of the human body. Szachacz said he would take the matter up with the other members of the Association and left (8-9).* On July 19, 1963, Szachacz returned to the premises and agreed to purchase 100 three-dimensional slides of nude women and ten hand viewers. He told the petitioner that if student reaction was favorable, he would purchase an additional 900 slides. He picked up the slides and viewers on July 22, 1963, and paid for the order in cash (10-11).

On the following day, Szachacz called the petitioner and stated that the students were satisfied with the slides, and that in order to raise money for the 900 additional slides, he was going to throw a party over the weekend. Szachacz told the petitioner that he would like to get some "bachelor-type films" to show at this party. The petitioner stated that he didn't think he had available what Szachacz wanted, but that he did have other art films Szachacz might be interested in. On the 25th day of July, the patrolman went to the petitioner's office (11-12). The petitioner greeted him as he walked in, and then went over to a chair and zipped open a blue valise. The petitioner took out of the valise a package of six white boxes, removed a rubber-band and selected one of the boxes, called his secretary over and said, "Here, give him the film." The secretary came over to Szachacz and said, "That would be five dollars for the film and twenty cents tax." Szachacz took the film, paid the money and stated that if the film was what he

* Unless otherwise specified, all references are to the Record on Appeal.

wanted he would return and purchase the other five films. He then left the office (13-14).

Later that same day, Szachacz returned to the petitioner's office, identified himself as a police officer and told the petitioner he was under arrest for selling pornographic film. Szachacz then went over to the chair where he had previously seen the petitioner unzip the blue valise and remove from the valise, which was still open, the other five boxes of film (15-16).

The white box and the enclosed film which had been sold to the patrolman, entitled "June Palmer, #2," were collectively put into evidence as People's Exhibit 1 (19). The other five rolls of film entitled, "M. Jordan," "B. Logan," "Karen Palmer," "Lorraine Burnett" and "Jayne Tracy" were put into evidence as People's Exhibits 2, 3, 4, 5 and 6 respectively (21-3). All the exhibits were viewed by the three trial judges in chambers (52-3). The court found that the three films marked People's Exhibits 1, 2 and 6 were obscene, and convicted the petitioner under the three corresponding counts in the information (57).

The Appellate Term of the Supreme Court, First Department, although reducing the sentences imposed, affirmed, as modified, the judgment of conviction on October 29, 1964. The Court of Appeals affirmed the judgment, without opinion, on April 15, 1965, and denied the petitioner's motion for leave to reargue on June 10, 1965.

Before examining the six films listed in the six counts of the information, the Court of Appeals had the films

spliced together and placed on one reel. As a result of error, the films were not spliced in the order in which they were received in evidence. The order in which the films now appear on the reel is as follows: Exhibits 1, 5, 3, 4, 2 and 6. The order in which the films were marked as exhibits correspond with the numbers of the counts of the information.

ARGUMENT

POINT I

The motion picture films designated as Exhibits 1, 2 and 6 are obscene and the element of *scienter* was proved beyond a reasonable doubt.

The conviction for violating Section 1141 of the Penal Law was predicated upon the sale of a box of film by the petitioner to the police officer, and on the petitioner's possession of five other boxes of film for the purpose of sale. It is urged by the petitioner that the three films upon which he was convicted are in fact and law not obscene, and that the necessary proof of current community standards and of *scienter* is lacking. However, examination of the three films involved and of the photograph on the box of the film sold, adequately refutes these arguments.

Element of Obscenity

Each of the films in question is an 8 mm. color production which reveals a woman lounging upon and strutting around a bed or sofa, assuming various contrived poses to accentuate her naked breasts and buttocks, which at times

are even more emphasized by vigorous and unnatural gyrations. In two of the films, People's Exhibits 1 and 6, the women perform naked, and although in much of the footage the pubic area is covered by the strategic placement of hands and thighs, portions of that region are at times visible to the viewer. In People's Exhibit 2 the woman wears a brief covering over her pubic area.' The only purpose of these patently offensive films, which have no possible social or artistic value, is to appeal to the viewer's prurient interest, and the trial court as well as the Court of Appeals were justified in determining that these films are obscene.

The petitioner not only contests the trial court's ultimate determination on the issue of obscenity, but argues that the judgment must be set aside simply because the People failed to present any evidence on the question of what is offensive to contemporary community standards; one of the constitutional tests to be applied in determining what constitutes obscenity.

This Court in *Roth* v. *United States,* 354 U. S. 476 (1957), endorsed as a test of obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests" [*id.* at 489]. Moreover, it was held that the material must be utterly without social importance and patently offensive in that it goes substantially beyond customary limits of candor in representing sexual matters [*id.* at 484; *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 482-6]. All of these standards were recently reaffirmed by this Court in *Jacobellis* v. *Ohio,* 378 U. S. 184, 191-2 (1964).

There are actually three separate standards upon which constitutional protection rests, any one of which can support the lawful dissemination of material. Each standard must necessarily be judged by a different litmus independently of each other. Due to the fact that subtle artistic merit is sometimes beyond the aesthetic appreciation of the average man, the standard of redeeming social value must be judged by the courts, perhaps with the aid of experts and critics. "Appeal to the prurient interest" must be taken quite literally and alone, and must be judged in terms of the susceptibility of those the material is likely to reach. Patent offensiveness must be evaluated in terms of contemporary community standards, and this is the domain of the average man who is most expressive and understanding of the community's tolerance. Surely the trier of fact, whether it be court or jury, is competent, without the assistance of the prosecution, to determine the community's current attitudes on what is patently offensive by applying common sense, experience and the knowledge which comes from being a member of the community. These points are all presently before this Court in *Mishkin* v. *New York*, #49 Oct. 1965 Term.

There is nothing in the concurring opinions of Justices FRANKFURTER and HARLAN in *Smith* v. *California*, 361 U. S. 147, 164-7, 171-2 (1959), which would necessitate the conclusion that the People have the burden of presenting proof on what is offensive to current community standards. Both opinions are concerned only with upholding the right of the defendant to offer evidence on the issue of what is within the community's concept of permissible candor, and do not attempt to impose a burden of proof upon the prosecution. This was made clear by Justice HARLAN when he stated:

"While a State is not debarred from regarding the trier of fact as the embodiment of community standards, competent to judge a challenged work against those standards, it is not privileged to rebuff all efforts to enlighten or persuade the trier" [*Smith* v. *California*, 361 U. S. at 172].

Nor does the recent decision of Judge Moore in *United States* v. *Klaw* (decided July 15, 1965) —— F. 2d —— (2d Cir.) Docket page 2758, compel the acceptance of the petitioner's argument. The *Klaw* case held that the conviction for the circulation of sado-masochistic literature alleged to appeal to the prurient interests of the deviate must be reversed because there was nothing presented to the jury which would enlighten them as to the nature of the appeal of the "bondage" material. This holding, which goes far beyond any pronouncements of this Court, is clearly not the law in New York. Moreover, the opinion is confined to the question of the prosecution's responsibility of proving the prurient appeal of the atypical material there involved, and is not concerned with the issue of contemporary community standards.

Element of *Scienter*

A conviction under Section 1141 cannot be upheld without proof of the element of *scienter* [*People* v. *Finkelstein*, 9 N. Y. 2d 342 (1961)], and the petitioner contends that *scienter* was not established by the evidence presented at his trial. The cases which have considered this issue, however, have repeatedly found circumstantial evidence of the quality introduced in the instant case to be sufficient.

The films were each packaged in a 3-inch by 3-inch white cardboard box, the cover of the box sold to the police officer contains a black and white picture of the woman depicted in the film, emphasizing her naked breasts in a sexually suggestive pose (Exh. 1). The officer told the petitioner that he wanted some "bachelor-type films." The petitioner stated he didn't have what the officer wanted, but that he did have other "art" films the officer might be interested in. The six films itnroduced at the trial were the films offered by the petitioner to satisfy the officer's explicit request.

In *Smith* v. *California,* 361 U. S. 147 (1959), this Court, in discussing the constitutionality of an obscenity statute, defined *scienter* as "knowledge by * * * [defendants] of the contents of the books," and stated that circumstances might warrant the inference that the seller was aware of the contents of a book despite his denial of knowledge. In *People* v. *Finkelstein,* 11 N. Y. 2d 300 (1962), the New York Court of Appeals, following *Smith,* cited several factors which may be used to infer the necessary element of *scienter,* among them being the covers of the books in question.

The picture on the box of film sold to the officer certainly must have apprised the petitioner of the nature of its contents. Moreover, the petitioner was aware of the type of films the officer wanted and told him that the films he was offering to sell might satisfy the officer's interest. Even the petitioner's denial to the officer at the time of his arrest when he said that the films were not pornographic (15), plainly indicates knowledge of the films' content. Clearly under these circumstances, the court was perfectly correct in inferring that the petitioner was fully cognizant

of the subject matter of the films for which he was convicted, and the establishment of that fact is sufficient to prove the essential element of *scienter* [*Smith* v. *California,* 361 U. S. at 149; *People* v. *Finkelstein,* 11 N. Y. 2d at 304]. To accept the petitioner's contention that *scienter* may only be established by proving that the accused in an obscenity case personally believes the articles involved are obscene, would render all obscenity convictions dependent upon the subjective opinion of those prosecuted, and would nullify the test of current community standards. This point, too, is presented by the *Mishkin* case, *supra.*

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

October, 1965

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

COBERT *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 21. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Court of Appeals of New York is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

THE CHIEF JUSTICE, MR. JUSTICE CLARK, and MR. JUSTICE BRENNAN would affirm.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.